SUPREME COURT, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 649

JACKIE WASHINGTON,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Criminal Appeals for the State of Texas (R. 14-20) is reported at 400 S.W.2d 756 (1966).

Jurisdiction

The judgment of the Court of Criminal Appeals for the State of Texas was entered on January 5, 1966 (R. 18). Motion for Rehearing was overruled without written opinion on February 23, 1966 (R. 19). Second Motion for Rehearing was denied by written opinion on March 30, 1966. Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis were filed and docketed as

Number 1667 Misc., October Term, 1965, on May 7, 1966. On October 10, 1966, the Petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis were granted as to Question 1 presented by the Petition (R. 21). The jurisdiction of this Court rests upon 28 U.S.C., Section 1257(3).

Question Presented

Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely, a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?

Statutes Involved

Article 82 of the Texas Penal Code provided as of the dates involved in this case:

"Parties to offense as witnesses

Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, can not be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others."

Article 711 of the Code of Criminal Procedure of 1925 provided as of the dates involved in this case:

"Principals, accomplices or accessories

Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

Statement

The proceedings at the State Trial of the cause and the evidence may be summarized as follows (references being made to the certified Statement of Facts [State Record of Testimony]):

The Petitioner was convicted in Criminal District Court Number 4 of Dallas County, Texas, of the offense of murder with malice. The jury assessed his punishment at fifty (50) years confinement in the penitentiary.

The State's evidence is reflected as follows: The Petitioner, a negro boy, had previously dated one Jean Carter but subsequently her mother had forbidden such dates (S.F. 76). This, coupled with the fact that she was dating another boy (the Deceased), apparently gave rise to some jealousy upon the part of Petitioner, and he, Petitioner, in the company of several boys on the night of August 29, 1964, began driving around Dallas, Texas, with the expressed intent of locating some sort of weapon with which to scare the girl and her then current boyfriend, the Deceased (S.F. 159-161; 172). Apparently, the plot was to scare someone and not to shoot anyone (S.F. 159; 160-161; 164-165; 216, lines 14-16). This drive to various

places in the City of Dallas ultimately led to Charles Fuller (a Co-Defendant tried separately and the recipient of a fifty [50] year penitentiary punishment), who had a shotgun (S.F. 128), and the parties, then consisting of six (6) boys, did obtain the gun of Charles Fuller (S.F. 128-129). After the consumption of some time in the successful search for shotgun shells (S.F. 131-137), the boys, having been joined by one W. E. Thomas (the supplier of the shotgun shells), drove to the vicinity of the Warren Street address of Jean Carter (S.F. 138-139). Apparently, Fuller, Petitioner, and three (3) of the boys got out, with Thomas and Mabry remaining in the parked automobile (S.F. 140). These five (5) boys walked through an alley to Warren Street (S.F. 141) and then the three (3) boys preceded Petitioner and Fuller to the front of Jean Carter's home, threw bricks toward the house, ran down the street, and circled back to the car before the return of Petitioner and Fuller (S.F. 142-155). At the time the bricks were thrown, Jean, her date (the Deceased), and her family were in the house preparing to eat a late supper (S.F. 63-66). The sound of the bricks caused the mother of Jean and the Deceased to run out onto the front porch and turn on the porch light (S.F. 67-71). At this point, a shotgun blast hit Deceased in the side fatally wounding him (S.F. 72-76), and thereby causing his death according to Dr. Sidney Stewart.

There were no witnesses identifying the person who fired the fatal shot, except, according to the evidence, that person was either Petitioner or Fuller. A few minutes after the return of the other three (3) boys to the automobile (S.F. 154), Petitioner and Fuller came running down the alley (S.F. 155), and they all drove away (S.F. 156). When

Petitioner and Fuller returned to the car, Petitioner said that Fuller had shot Mrs. Marion Carter (the mother of Jean) (S.F. 165), and Petitioner was angry at Fuller because he had shot the gun at someone, saying that he, Fuller, was "trigger happy". The State offered evidence reflecting a prior intent of Petitioner to apparently shoot or harm the Deceased (S.F. 98; 99; 124, line 1; 147, line 8). But the State's evidence was conflicting (S.F. 200; 216, lines 14-16; 217, line 24; 288, lines 24-25; 219). The testimony of State witnesses, Eaton and Mabry, was ambiguous; they being the only State witnesses testifying to the chain of events, the remaining State witnesses not having seen or identified the participants.

Lorenzo Mabry, testifying for the State, stated that he saw the Petitioner the next day and, advising Petitioner that the Police were after him, the Petitioner, Petitioner denied having done anything (S.F. 206, line 15). However, he further testified that Petitioner called one Billy Bradley and told her that if anyone came by the house to tell him that he, Petitioner, had spent the night with her (S.F. 206). The evidence further reflected that the witness, Mabry, gave a signed statement to the Police in which he stated that Petitioner told him on the afternoon of the next day that he, Petitioner, "shot a woman last night" (S.F. 209, line 13), which statement was denied on the stand by such witness.

The Petitioner, testifying in his own behalf, and other defense witnesses stated that the Co-Defendant, Fuller, was drunk (S.F. 347), that Fuller took the gun from him, the Petitioner (S.F. 259; 283; 349), and that the other three (3) boys ran toward the house on Warren Street (S.F. 350). The Petitioner further testified that after Fuller

approached the house that he, Petitioner, wanted to leave but that Fuller insisted that he was going to shoot somebody (S.F. 352, lines 6-7), and that, after trying unsuccessfully to get Fuller to leave, the Petitioner began running back toward the automobile (S.F. 352). Petitioner stated that he had just rounded the corner at the alley when he heard the gun go off and a woman's scream (S.F. 353-354). Petitioner stated that he had seen Mrs. Carter stick her head out of the door of the house just before he began running and that he thought at the time that Fuller had shot Mrs. Carter (S.F. 354), but that Fuller denied shooting a woman after he came running back to the car behind Petitioner (S.F. 355). One (1) defense witness remembered Petitioner returned to the car first, with Fuller close behind with the gun (S.F. 284).

There being no witness to affirm or deny Petitioner's statement that he abandoned the project and tried to get Fuller to desist when he recognized that Fuller was intent upon killing rather than frightening someone, the testimony of the Co-Defendant, Fuller, was obviously vital to the defense of Petitioner. However, in apparent reliance upon Article 711, Code of Criminal Procedure of 1925, the Trial Court Judge refused to permit the testimony of the Co-Defendant to be offered in behalf of Petitioner at the trial (S.F. 248, lines 23-25; 249, lines 1-14) (R. 2-7); the substance of such testimony being reflected by the Affidavit of such Co-Defendant admitted in evidence at the hearing on the Motion for New Trial (R. 8-14).

Summary of Argument

To deny an accused the right to an available fact witness, in the form of the Co-Defendant, vital to his defense, strikes at the heart of due process. The dead hand of the common law has no rational basis and is but a remnant of an age since passed. To suppress by statute evidence from a witness that is vital to an accused, while declaring the same witness competent to testify for the State, renders the accused a victim of a paradoxical deprivation of due process. The aim of the due process requirement—the essence of the Sixth and Fourteenth Amendments to the Constitution of the United States—is not to eliminate presumptively false evidence but to prevent fundamental unfairness in the use of evidence whether true or false.

ARGUMENT

The Petitioner's Conviction and Sentence Is Void Because He Was Denied His Rights Under the Sixth and Fourteenth Amendments to the Constitution of the United States to Have Compulsory Process in Obtaining an Available Witness in His Favor, Namely, a Co-Defendant, Charged and Previously Convicted Under a Separate Indictment for the Same Transaction, and Which Co-Defendant, According to His Affidavit, Could Have Exonerated Petitioner If Such Testimony Were Offered to and Believed by the Jury.

As reflected by Petitioner's Formal Bill of Exception (R. 4-7), Petitioner offered the testimony of the Co-Defendant, Charles Fuller, who had been previously tried and convicted in the same Trial Court for the crime of

murder with malice arising out of the same transaction. The jury assessed Fuller's punishment at fifty (50) years in the penitentiary. The opinion on appeal in Fuller's case is reported in *Fuller* v. *State*, 397 S.W.2d 434 (Tex. Crim. App. 1966).

The State objected to the calling of Fuller for the reason that Fuller was currently under the aforesaid conviction. The Court, in reliance upon Article 82, Texas Penal Code, and Article 711, Texas Code of Criminal Procedure of 1925, sustained the objection of the State, thereby depriving Petitioner the use of Fuller as a witness in his behalf. A reoccurrence of the violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States occurred at the time of Petitioner's hearing on his Amended Motion for New Trial. The Trial Court, however, permitted Petitioner to make his offer of proof in the form of an Affidavit from Fuller reflecting that Petitioner attempted, just prior to the shooting, to make Fuller desist, and, when unable to do so, Petitioner turned and ran prior to the actual shooting (R. 8-14). Thus is brought into focus the question as to whether or not Article 711, Texas Code of Criminal Procedure of 1925, and Article 82, Texas Penal Code, deprived Petitioner of his right to have compulsory process to obtain a witness in his favor under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Some clarification must necessarily be made as to the Opinion written by the Texas Court of Criminal Appeals on original submission, wherein it is stated:

> "The Arts. 711, C.C.P. and 82, P.C., have welded to them the severance statutes (Arts. 650, 651, 652, 653

and 654, C.C.P.) which provide the means and procedure for obtaining the testimony of accomplice witnesses."

It was stated to the Texas Court of Criminal Appeals in Petitioner's brief in support of his Second Motion for Rehearing that the statement of the Texas Appellate Court with regard to the availability of the severance statutes is completely invalid. This is so because in order to use the applicable severance statute, the Petitioner would have had to file a false affidavit and his attorney would have had to suborn the filing of such false affidavit. Under the only conceivably applicable severance statute, Article 651, Texas Code of Criminal Procedure of 1925, a Motion thereunder to be sufficient must be supported by an affidavit, and that affidavit must state (1) that the evidence of such other party is material for the defense of the affiant, and (2) that affiant believes that there is not sufficient evidence against said party to secure such party's conviction. See, cases collected, 2 Branch's Texas Penal Code, 2d Ed., Section 763, page 80. In light of the fact that the testimony of Petitioner and the Affidavit of his Co-Defendant, Fuller, reflects guilt of such Co-Defendant, Petitioner could not truthfully make such an Affidavit. Further, insofar as severance is concerned under the law of the State of Texas, Petitioner could never use his Co-Defendant's testimony until the Co-Defendant served his fifty (50) year sentence. But this, of course, would be of no aid to Petitioner since a severance statute does not operate to merely continue a case. *Nichols* v. *State,* 231 S.W.2d 425 (Tex. Crim. App.). Even assuming that Petitioner could have falsely obtained a severance—what would be the result? The Co-Defendant would be tried first; and he was so tried first in this in-

stance. While the Texas Appellate Court's position is plainly fallacious, no response was made by that Court to Petitioner's foregoing expressed summary of the Texas law relating to severances.

Petitioner would bring to the Court's attention the fact that Article 711 of the Texas Code of Criminal Procedure of 1925, and Article 82 of the Texas Penal Code, were, by implication, repealed by Articles 36.09 and 38.10 of the Texas Code of Criminal Procedure of 1965 (effective January 1, 1966). The latter Articles, providing that a Co-Defendant may testify on behalf of another Co-Defendant, being inconsistent and irreconcilable with Articles 711 and 82, repealed such Articles by operation of the rules of statutory construction as set forth by the Texas Court of Criminal Appeals, *Parshall* v. *State,* 138 S.W. 759 (1911); *Espalin* v. *State,* 237 S.W. 274 (1921), and the Supreme Court of Texas, *Townsend* v. *Terrell,* 118 Tex. 463, 16 S.W.2d 1063 (1929); *Popham* v. *Patterson,* 121 Tex. 615, 51 S.W.2d 680 (1932). These rules of statutory construction are binding upon this Court. *Standard Oil Company* v. *New Jersey,* 341 U.S. 428 (1950); *United States* v. *Burnison,* 339 U.S. 87 (1949); *Winters* v. *New York,* 333 U.S. 507 (1947).

Although this Court does not sit to decide arguments after events have put them to rest, *United States* v. *Alaska Steamship Company,* 253 U.S. 113 (1919), such a situation is not here presented by the repeal of Articles 711 and 82. Petitioner was tried and convicted of murder in 1965, for a crime committed in 1964. Articles 36.09 and 38.10 of the 1965 Code of Criminal Procedure have no application to Petitioner's rights at the time of his trial. As an individual directly aggrieved by the legislation in question,

Petitioner may properly urge the unconstitutionality of such legislation before this Court. *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923); *Citizens National Bank* v. *Kentucky,* 217 U.S. 443 (1909). Two fundamental rights embodied in the Sixth Amendment to the Constitution of the United States have been recently applied to the States. The right of the accused to be represented by counsel in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and the right of the accused to examine witnesses against him in *Pointer* v. *Texas,* 380 U.S. 400 (1965), have now been recognized. Is it less imperative upon the States that the accused have the right to call witnesses in his own behalf to aid in the presentation of the truth? Is access by an accused to witnesses in his own behalf inherent in the concept of due process?

At the time of Petitioner's trial in 1965, Articles 711 and 82 represented some of the last vestiges in the United States of the common law concept of the incompetency of witnesses interested in the result of litigation (see, Appendix A). While the original common law jury system underwent a complete evolutionary cycle, from the choosing of jurors for their knowledge of the cause obtained prior to the trial to their lack of knowledge of the facts of the case, the competency of witnesses was to emerge in an altogether different manner; as observed by Mr. Justice Brennan in detailing the law's struggle for the competency of the criminal defendant as a witness in *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

The emergence of the criminal co-defendant came about in a likewise slow manner. In the early case of *United States* v. *Reid,* 12 How. 361 (1851), wherein two persons were jointly indicted for murder on the high seas and

tried separately, it was held that they were incompetent witnesses on behalf of each other. In reaching this decision, the Court applied the common law in existence at the passage of the Judiciary Act in 1789 as the law to be followed by the Federal Courts. In *Benson* v. *United States,* 146 U.S. 325 (1892), two persons were jointly indicted for murder. The Government sought to enjoin the testimony of one of the co-defendants by citing *Reid* as controlling. The *Benson* Court, however, declined to follow the reasoning of *Reid* and re-examined the question of competency in the light of "general authority and sound reason." 146 U.S. at 335. After establishing that the theory of the common law was to admit to the witness stand only those presumably honest, appreciative of the sanctity of the oath, unaffected as a party by the result, and free from the temptation of interest, the Court said:

> "But . . . today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness, those matters which heretofore were ruled sufficient to justify exclusion." 146 U.S. at 335.

In *Rosen* v. *United States,* 245 U.S. 467 (1917), this Court emphasized that the dead hand of the common law should have no application in the determination of the competency of witnesses.

> "In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more

> likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." 245 U.S. at 471.

By 1933, an evolution had indeed taken place. In holding that a co-defendant was a competent witness in *Funk* v. *United States,* 290 U.S. 371, it was stated:

> "Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances." 290 U.S. at 380.

It is observed then, that the common law feared the injection of false testimony on the part of an interested witness and, therefore, called for his exclusion from the witness stand. But with this common law anxiety discarded in favor of the search for truth, what purpose can Articles 711 and 82 serve but to suppress the truth?

Petitioner relies upon *Brady* v. *Maryland,* 373 U.S. 83 (1963). Brady and a companion were indicted for felony murder. Brady was tried first, convicted and sentenced to death. Prior to trial his attorney requested the prosecution to allow him to examine the extrajudicial statements of Brady's companion. Several of such statements were

exhibited to him by the prosecution, but the one containing the admission of the actual homicide was withheld. Not until after Brady was sentenced did his attorney gain knowledge of such admission. A motion for new trial was overruled, as was a petition for post-conviction relief. On appeal, the Maryland Court of Appeals held that the suppression of evidence by the prosecution denied the Petitioner due process of law, and remanded the case for retrial of the issue of punishment only. On Certiorari, this Court affirmed the Maryland Court's decision that even had the confession of the other defendant " . . . been in evidence, nothing in it could have reduced appellant Brady's offense below murder in the first degree." This Court held that suppression of evidence favorable to the accused is sufficient of itself to amount to a denial of due process. 373 U.S. at 104. If " . . . [T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," 373 U.S. at 104, is not a State statute which suppresses the introduction of evidence favorable to the accused likewise a denial of due process? We think it is.

While States are free to prescribe rules of evidence, the due process clause of the Constitution is a limitation upon the power of the legislature in enactment of statutory rules of evidence in criminal cases. *Tot* v. *United States*, 319 U.S. 463 (1943); *United States* v. *Delia*, 319 U.S. 463 (1943); *Salsburg* v. *Maryland*, 346 U.S. 545 (1953).

The aim of the requirement of due process in a criminal trial is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. *Lisenba* v. *California*, 314 U.S. 219 (1941), reh. den. 315 U.S. 826.

> "The fundamental basis upon which all results of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U.S. at 381.

These two statutes go further than the mere suppression of evidence favorable to an accused. They provide that notwithstanding the fact that a co-defendant is incompetent to testify on behalf of another co-defendant, he is competent to testify for the State of Texas against the defendant. While the Petitioner has no standing to attack the provisions of Articles 711 and 82, allowing the Co-Defendant to testify as a competent witness for the State, under the same circumstances in which the Co-Defendant is disrobed of that competency to testify on behalf of the Defendant, it is Petitioner's contention that these diametrically opposed provisions are so inextricably intertwined as to render Petitioner the victim of a paradoxical deprivation of due process. Is the co-defendant presumed to testify to the truth when he is a witness for the State and conversely presumed to perjure himself when testifying on behalf of another co-defendant? While this appears incredibly capricious and arbitrary, the statutes are susceptible of no other interpretation.

A defendant in a criminal proceeding is a competent witness on his own behalf and a statute declaring him incompetent is unconstitutional as violative of the due process clause of the Fourteenth Amendment to the Constitution. *Ferguson* v. *Georgia,* 365 U.S. 570 (1961), concurring opinions of Justices Frankfurter and Clark (the majority of the Court being unable to entertain an attack on Georgia's incompetency statute since *Ferguson,* in their opinion, had

not properly perfected the error, 365 U.S. at 572, footnote 1). As stated by this Court in *Funk* v. *United States,* 290 U.S. 371 at 379:

> "It seems difficult to escape the conclusion that the specific ground upon which the Court (in *Benson*) rested its determination as to the competency of the co-defendant was that, since the defendant had been rendered competent, the competency of the co-defendant followed as a natural consequence."

The original unamended Constitution contained no provision relating to compulsory process for witnesses in behalf of a criminal accused.

> "But as soon as the public attention was called to the fact that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States the same mode of trial, and the same mode of proceeding, that had been previously established and practiced in the courts of the several States.
>
> "It was for this purpose that the 5th and 6th amendments were added to the Constitution. The 6th amendment provides that, in all criminal prosecutions, the party accused shall be entitled to a trial by jury, to be confronted with the witnesses against him, to have compulsory process for the witnesses in his favor, and to have the aid of counsel in his defense." *Reid* v. *United States,* 12 How. at 365.

We deal here with a fundamental right—the right of the Petitioner to present the truth in defense of criminal charges against him. For a State to deny him access to a witness capable of presenting that truth to a jury is to indulge in an "unsatisfactory remnant of an age gone by," Mr. Justice Clark, dissenting in *Ferguson* v. *Georgia*, 365 U.S. at 602, denying Petitioner due process of law.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Dated: January 3, 1967.

Respectfully submitted,

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